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Supreme Court, U.S.
FILED
JUL 24 2007
OFFICE OF THE CLERK

No. 06-1497

In the Supreme Court of the United States

VISION CHURCH, UNITED METHODIST, THE NORTHERN ILLINOIS CONFERENCE OF THE UNITED METHODIST CHURCH, AND HEE-SOO JUNG, PRESIDING BISHOP, PETITIONERS

v.

VILLAGE OF LONG GROVE, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF IN SUPPORT OF CERTIORARI

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REPLY BRIEF IN SUPPORT OF CERTIORARI

Respondent does not dispute the tremendous practical importance of the questions presented to thousands of religious congregations and municipalities nationwide, or to the United States' own RLUIPA enforcement efforts. As shown in the petition and confirmed by the *amici curiae*—denominations representing some 84 million individuals and 170,000 congregations—the "effectively impracticable" standard applied by the court below (and others) guts RLUIPA and leaves houses of worship subject to virtually unreviewable land use rulings. And so, quite apart from the conflicts in the lower courts, the need for guidance on these recurring issues of national significance warrants plenary review. See Rule 10(c).

Nothing in the opposition, moreover, undermines our showing (Pet. 11-17) that the circuits are in express conflict over the meaning of the "substantial burden" standard, that these divergent standards produce divergent results, or that application of another circuit's standard *would* have produced a different result here—especially on a motion for summary judgment by the local government. Nor does the opposition cast any doubt on the need for review of the "equal terms" and equal protection issues.

A. The "Substantial Burden" Issue.

The Village claims the conflicting decisions on the substantial burden issue are "fact-based and nuanced," and reflect only "semantic differences." Opp. 11, 15. But because no two properties (or churches' needs) are exactly alike, such decisions will *always* present factual differences. The question is whether the conflicting *legal* standards lead to different results in reasonably comparable cases. They clearly do.

1. No one can seriously dispute that this case would have come out the other way had the court below applied the Ninth or Eleventh Circuits' rules. See Pet. 14-17. In

those courts, the RLUIPA standard is not whether the state's action has "render[ed] religious exercise * * * effectively impracticable," but merely whether that action has "more than an incidental effect on religious exercise," creates "pressure that tends to force adherents to forgo religious precepts," or "impose[s] a significantly great restriction or onus upon [religious] exercise." Pet. 13. Under these more generous standards, legal maneuvering, uncertainty, delay, and the cost of repeated applications *may* be a substantial burden.

Not surprisingly, then, the Ninth Circuit has described its own standard as "more lenient" than the Seventh Circuit's "narrower definition" of substantial burden. *Guru Nanak*, 456 F.3d at 988-999. And the Eleventh Circuit has "decline[d] to adopt" the Seventh Circuit's standard because it renders the Act "meaningless." *Midrash Sephardi*, 366 F.3d at 1277.

Moreover, even assuming (as the Village argues) that other circuits consider similar factors, and that *some* of the cases would come out the same way under either standard, that does not diminish the fact that the legal standards are significantly different and would lead to different results in *many* cases, including this one.

The Village's reliance on *San Jose Christian College* v. *Morgan Hill*, 360 F.3d 1024, 1035 (9th Cir. 2004) (Opp. 16), is instructive. The Village quotes a passage from that case for the proposition that the Ninth Circuit's approach is "consistent with the Seventh Circuit's." *Ibid.* In *Guru Nanak*, however, the Ninth Circuit *rejected* the view that "[*San Jose Christian*] defined the phrase 'substantial burden' by reference to the Seventh Circuit opinion in *Civil Liberties [CLUB]* that adopted a narrower definition of the phrase." 456 F.3d at 988 n. 12. Thus, when *San Jose Christian* stated that its holding was "consistent" with *CLUB*, the court meant only that "[f]ailure by San Jose Christian College to present a complete land use applica-

tion *can* fail the more lenient 'oppressive to a significantly great extent' test *as well as* the 'effectively impracticable' test. That is the consistency; *it does not mean the former case adopted the latter case's test.*" *Ibid.* (emphasis added). Thus, the Village's own authorities show that the Ninth Circuit has rejected the claim that its "substantial burden" standard is the same as the Seventh Circuit's.

2. Respondent next suggests that *Petra Presbyterian Church* v. *Village of Northbrook*, 2007 WL 1628113 (7th Cir.) (June 7, 2007), and *Sts. Constantine & Helen Greek Orthodox Church, Inc.* v. *City of New Berlin*, 396 F.3d 895 (7th Cir. 2005), undermine our showing of a genuine conflict. But like the decision below, *Petra Presbyterian* followed earlier decisions—including *CLUB*, which established the "effectively impracticable" test—and held that denying a church the right to locate in an industrial zone was *not* a substantial burden. 2007 WL 1628113, at *5.

City of New Berlin is no more helpful to the Village. There, the City barred a church from building on a 40-acre residential property flanked on one side by another church and on the other by land owned by a third religious body. After detailing how "[t]he repeated legal errors by the City's officials casts doubt on their good faith," the court found a substantial burden. 396 F.3d at 899. Notably, however, Judge Posner's opinion for the court did *not* expressly apply the "effectively impracticable" test from which he dissented in *CLUB*. Indeed, as he later explained in *Petra Presbyterian*, "[i]n [*City of New Berlin*] the denial was so utterly groundless as to create an inference of religious discrimination, so that the case could equally have been decided under the 'less than equal terms' provision of RLUIPA." 2007 WL 1628113, at *5. Thus, *City of New Berlin* casts no doubt on our showing (at 12) that the "effectively impracticable" test has yet to result in a finding of substantial burden.

3. The Village attempts to minimize this acknowledged conflict by suggesting that, in contrast to the land use rulings in these other cases, the Village objected only to the *size* of Vision's plan. But the Village never says it would have granted a 55,000 square-foot plan,[1] and only months earlier it had *denied* a 56,200 square-foot plan. Contrary to the Village's intimation (at 7, 15, 24), moreover, neither court below found that a smaller plan would have been approved.[2] And, on the Village's motion for summary judgment, the lower courts were obliged to resolve any conflicts in the evidence in favor of the Church.[3]

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[1] Respondent's assertion (at 6, 24-25) that a 55,000 square-foot facility "would more than meet [Vision's] current and future needs" is not supported by the record, and the district court made no such finding. In fact, Vision's expert testified (without contradiction) that, based on past growth rates, Vision would likely grow by 20% per year upon entering a larger facility, reaching 746 members by 2005 (and 1,074 members by 2007). Pl.'s Mot. Summ. J., Book of Exs., Tab 76 at 7 (Report of Dr. Rainer) ("Tab"). Vision's architect testified (also without contradiction) that a congregation with average attendance of 1,000 would need a "total area [of] 74,080 square feet." Tab 66 at 39 (Tobias). A permanent cap of 55,000 square feet—with no opportunity even to *apply* for future expansion—was therefore a significant restriction on projected growth.

[2] Indeed, the Assembly Ordinance was simply an *additional* restriction that had to be satisfied "in addition to all other applicable Village code provisions," (Opp. App. 1) including the highly discretionary special use permit considerations (Pet. App. 82a) that served as the basis for denying the 56,200 square-foot proposal months earlier—when there was *no* size restriction in the zoning ordnance. The Assembly Ordinance thus made it *less* likely that Vision could obtain Village approval.

[3] This is the complete answer to the Village's repeated claims that Vision has "distorti[ed]" the record. Opp. 2, 3 n. 1, 4 n. 2, 6, 8. In fact, each of Vision's factual statements is amply supported by the record:

More fundamentally, the Village's analysis ignores the *other* ways in which its denial substantially burdened Vision: (1) by limiting the number and types of its services; (2) by restricting its "major activity" to once a week, unless pre-approved by the Village; (3) by causing it to incur additional planning costs of some $400,000; (4) by forcibly annexing its property on the eve of the county's approval of its building plans; and (5) by creating delay and uncer-

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- For the hostility of local residents, including evidence of race-based hostility (Pet. 4; Opp. 4 n. 2), see Tab 76 at ¶ 23 (Decl. of Rev. Jang) ("[P]ublic reaction to Vision's plan was vehement and hostile."); Supp. Appx. in Support of Summ. J., Ex. D with Ex. 4 at 9 (Expert Letter of Steven Albert) ("Public inquiry on the legal issues included questions of zoning, taxes, restrictive use *and community conflict over allegations and/or denials of bias, prejudice and racism.*") (emphasis added). Moreover, DOJ's "Community Relations Service"—which has the mission of resolving "community conflicts and tensions arising from differences of race, color, and national origin"—initiated mediation in an effort to restore civility to the proceedings. DOJ-CRS Case File No. 05-0013-01 (opened Dec. 15, 2000) (http://www.usdoj.gov/crs/).
- For the statement that Vision had 300 members (Pet. 2; Opp. 3 n. 1), see Tab 76 at 7 (Decl. of Rev. Jang) ("By 2000, the church had grown to approximately 300 adult members."); Tab 74 at 5 (Report of Mr. Rainer) ("Attendance reached 300 in 2000.")
- For the discussion between the Village Manager and Rev. Jang (Pet. 3; Opp. 2-3), see Tab 76 at ¶¶ 10-15 (Decl. of Rev. Jang) ("Next Doughty and I discussed [a fourth] property, * * * [and] Doughty encouraged me that 'this is the best place to build a church in Long Grove.'").
- On whether the Assembly Ordinance was targeted at Vision (Pet. 7; Opp. 6), see, *e.g.*, Tab 71 (Internal Memorandum of Village Planner); Tab 61 at 148-49 (Deposition of Village Planner) ("Q. * * * [W]hat was discussed was they [the Village] were going [to] bring down the size of the sanctuary by reducing the maximum square footage [in the Ordinance] to 55,000 for a community facility? A. That's correct.").

tainty that have severely hampered its ability to serve its members, resulting in a much smaller church. Pet. 8. The Village offers no response to these points. But they conclusively show size is not the only issue—or even the most important one.

4. For similar reasons, the Village's attempt (at 17) to distinguish *Guru Nanak* on the ground that "there was no uncertainty about Vision's ability to locate at its preferred site if it simply complied with the specific standards contained in the Public Assembly Ordinance" is preposterous, especially given the summary-judgment posture of this case. As the Village concedes, *Guru Nanak* found a substantial burden based on the fact that, in light of the county's broad reasons for the permit denials, "any future [permit] applications * * * would be fraught with uncertainty." 456 F.3d at 990-991.

So too here. In fact, the record indicates that Vision faced even more uncertainty than Guru Nanak. Pet. 15-16. Guru Nanak faced none of the highly invasive permit conditions and overtly hostile maneuvering that Vision has faced. These hostile actions—including not only direct attempts to control Vision's religious activities, but also drastic use of the forcible annexation statute and passage of the specially targeted (and retroactively applied) Ordinance—suggested not only that future permit applications would fail, but that the Village had a strong resolve to keep Vision from ever obtaining a permit.

In sum, there is no question that the result here would have been different under the Ninth Circuit's "more lenient" definition of substantial burden—especially on a motion for summary judgment by the Village.

5. Contrary to the Village's suggestion, we have never argued that RLUIPA invalidates "'*any* regulation that inhibits or constrains the use, building, or conversion of real property for the purpose of religious exercise.'" Opp. 12.

And we agree that this reading would "render meaningless the word 'substantial.'" *Ibid.*

The same can be said, however, of a reading under which a burden is "substantial" only if it makes religious exercise "effectively impracticable." To "burden" something is to "weigh [it] down" or "overload" it—*i.e.*, to make it more difficult. See *The American Heritage Dictionary of the English Language* 247 (4th ed. 2000). To make something "impracticable," by contrast, means to make it "impossible." *Id.* at 882. Thus, while making religious practice impracticable always burdens it, the converse is not true. By assuming that it is, the Seventh Circuit's standard guts RLUIPA and directly contravenes the requirement that RLUIPA be construed "in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution." 42 U.S.C. § 2000cc-3(5).

6. Finally, the Village does not respond to our showing that several other courts—including the Fifth and Tenth Circuits and Washington Supreme Court—have adopted conflicting views of the meaning of "substantial burden" either prior to the Seventh Circuit's RLUIPA cases or under the Free Exercise Clause. Pet. 14, 16. Nor does the Village answer our point that the decision below conflicts with this Court's precedents on the meaning of substantial burden.[4] See Pet. 17-19. These points, however, further underscore the depth and importance of the conflict, as does the Village's acknowledgment that "other circuits have approvingly cited Seventh Circuit cases." Opp. 11.

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[4] Respondent flippantly dismisses *Sherbert*, 374 U.S. 398, and *Thomas*, 450 U.S. 707, on the ground that they are "constitutional," not statutory cases (Opp. 19 n. 11), but even the court below (along with other circuits) acknowledged that RLUIPA's "substantial burden" standard is "defined * * * by reference to" these very cases. Pet. App. 62a.

The conflict is now so deep and entrenched that only a decision by this Court can ever resolve it.

B. The "Equal Terms" Issue

On the "equal terms" issue, the Village does not dispute that, under Eleventh Circuit law, RLUIPA requires equal treatment of religious and nonreligious assemblies that have a "comparable community impact." *Konikov*, 410 F.3d at 1327. Nor does the Village disagree that Vision's proposal and the larger public school complex across the street have comparable community impacts. Thus, there can be no dispute that this case would have come out differently under the Eleventh Circuit's rule—especially on a motion for summary judgment by the government.

1. Instead of trying to reconcile the decision below with *Konikov*, the Village argues that public schools do not "fall within the class of 'nonreligious assemblies or institutions' that municipalities must treat on 'equal terms,'" and that municipalities are therefore free to treat religious institutions less favorably than public schools. Opp. 20. This may be the practical effect of the Seventh Circuit's decision—indeed, the Village's only support for its "public schools" exception to RLUIPA is the court's statement that "public schools serve a unique public function"—but it is not the law in the Eleventh Circuit or anywhere else. Nor is there any support for this view in RLUIPA's text, which applies equally to *any* "nonreligious assembly or institution," whether public or private. 42 U.S.C. § 2000cc(b)(1).

2. Recognizing that Vision and the public schools have comparable community impacts, the Village seeks (at 20-21) to justify its unequal treatment on the ground (1) that "Vision and the elementary schools were subject to different standards" because the public schools were already built when they applied for annexation and a special use permit, and (2) that the schools received approval before the Assembly Ordinance passed.

First, however, nothing in the record suggests that different zoning standards apply to structures that have already been built than those that have not, and the Village cites nothing to this effect. Opp. 21 n. 14. In fact, it is undisputed that Vision and the public schools applied for the very same relief—voluntary annexation, rezoning, and a special use permit—and that the same legal standards governed each. Pet. App. 71a.

Second, far from justifying the unequal treatment, the Assembly Ordinance heightens it. By it own terms, the Ordinance does not apply to public schools. *A fortiori*, it would have made no difference in the approval or rejection of the schools complex, and it does nothing to distinguish the schools from Vision. It merely adds to the unequal treatment: churches and private religious schools are subject to an onerous size restriction, while public schools—with an admittedly "comparable community impact"—are completely exempted. This is precisely the type of unequal treatment condemned by RLUIPA and which would have led to a different result under settled Eleventh Circuit precedent. See *Midrash*, 366 F.3d at 1231 (finding unequal treatment where clubs and lodges could locate in business districts, but religious assemblies could not).

C. The Equal Protection Issue

On the equal protection issue, the Village does not dispute the existence of a circuit split over the proper level of rational basis scrutiny applicable to land use regulations under *Cleburne*. Opp. 22. Instead, the Village curiously maintains that *Locke* v. *Davey*, 540 U.S. 712, 720 n. 3 (2004)—which involved funding of religious education, devoted three sentences to equal protection, and never mentioned *Cleburne*—addresses and resolves this split.

Locke, however, is irrelevant here. The question of heightened rational basis scrutiny was not presented, and therefore not addressed in *Locke* (even in dicta). And

Locke had nothing to do with discretionary land use regulations—the critical context not only of *Cleburne*, but of each case cited by Vision (and of the Question Presented). *Locke*, therefore, says nothing about whether courts should apply a heightened form of rational basis review to land use regulations that interfere with religious land use.

Aside from raising the red herring of *Locke*, the Village fails to address Vision's showing (confirmed by Judge Posner's dissent in *CLUB*) that, in contrast to the Seventh Circuit, the Third, Fourth, and Eighth Circuits all apply a heightened form of rational basis scrutiny to land-use regulations affecting religious land uses. Although the Village quibbles with the procedural posture of *Congregation Kol Ami*, 309 F.3d 120, observing (correctly) that the Third Circuit reversed the district court for failing to analyze whether the two uses were "similarly situated," this does not undermine the court's instruction that on remand rational basis review must be "meaningful" and alert for "animus or other improper motive," *id.* at 133, 135—unlike the Seventh Circuit's review here. And the Village does not even attempt to address the other cases cited by Vision, or Judge Posner's *CLUB* dissent, all of which confirm the existence of a circuit split on this important issue.

CONCLUSION

The Court should grant review to resolve the existing conflicts and confirm that RLUIPA and the Constitution provide substantial protection from religious discrimination operating under the guise of land-use regulation.

Respectfully submitted.

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